BOMBAY TRADING CO. PTE. LTD. & ORS.

v.

THE OWNERS OF THE VESSEL "FELICIE" & MARMAESTRA COMPANIA NAVIERA S.A. (AS INTERVENERS)

HIGH COURT, SINGAPORE
M KARTHIGESU J
[HC ADMIRALTY IN REM NO. 356 OF 1976]
27 SEPTEMBER 1991

SHIPPING: *Arrest of vessel - Claim for port dues from Port Singapore Authority - Whether forms part of sheriff's expenses - Whether paid out of proceeds of sale of arrested vessel in priority to all other claims - Whether ranks pari passu with other items in sheriff's expenses - Specific rights under specific legislation - Port of Singapore Authority Act (Cap 173) [Sing], ss. 53, 64, 64(1), (2), (3), 65 - Port of Singapore Authority (Scale of Dues and Rates) Notification 1980 [Sing], s. 1 Item 1(d)(ii) First Schedule.*

These two motions were filed by the Port of Singapore Authority (PSA) as interveners (the PSA motion) and the first plaintiff (the priorities motion). The PSA Motion was for the payment of $196,560 (the said sum) from the proceeds of sale of the vessel *"Felicie"* and bunkers to them as sheriff's charges and expenses in respect of port dues incurred by the *"Felicie"* during the time she was under arrest in these proceedings. The priorities motion was for the determination of priorities for payments of the sheriff's expenses incurred in the arrest and sale of the *"Felicie"*, the first plaintiff's claims against the defendants for which a judgment had been entered in these proceedings and PSA's claim for port dues, garbage dues and pilotage dues at the said sum.

The question to be addressed in both motions is whether PSA's claim for port dues of a vessel arrested in admiralty proceedings forms part of the sheriff's expenses and whether it is paid out of the proceeds of sale of the arrested vessel in priority to all other claims as such, and if so, whether it ranks *pari passu* with the other items forming the sheriff's expenses or does it rank paramount to all the other items forming the sheriff's expenses.

Held:

[1] PSA port dues payable in respect of vessels arrested in admiralty proceedings are paid out to the PSA as part of the sheriff's expenses either recovered from the arresting party or more commonly out of the proceeds of sale after the vessel is sold by an order of Court.

[2] Port dues form part of the sheriff's expenses and are recoverable as such, in priority to all other claims from the proceeds of sale of the vessel arrested in admiralty proceedings. The practice of the sheriff treating PSA's port dues and other dues is well founded and has been an established practice since well before 1976.

[3] There is no requirement for the PSA to first obtain a judgment in civil proceedings before enforcing a claim for port dues. The person to be sued for the dues is the owner of the vessel, notwithstanding that pursuant to s. 53 of the Port of Singapore Authority Act (the PSA Act) the agent and the master, and by s. 64 of the PSA Act, the master are also made liable. References to agent and master in ss. 53 and 64(1) indicate the vicarious liability of the owner through the acts of his agents or servants.

[4] Although technically the application by PSA should have been made by the sheriff there is no reason to deny the PSA of what is due to them as a statutory right due to this procedural impropriety. However, the PSA ought to be deprived of part of the costs of the hearing of the two motions.

[5] The PSA are entitled to be paid the port dues in the sum of $196,560 as a paramount first priority payment out of the proceeds of sale of the *"Felicie"* and her bunkers now in Court. The balance sum after this payment remaining in Court shall be paid to the first plaintiff or to its solicitors towards the remainder of the sheriff's expenses and the first plaintiff's judgment in these proceedings in that order.

[*Order accordingly; one set of costs for both motions; first plaintiff to pay PSA one half of taxed costs*.]

Cases referred to:

Mersey Docks and Harbour Board v. Hay & Ors. (The Countess), [1923] AC 345; [1923] 14 Ll L Rep 441 ***(cit)***
The Queen of the South [1968] 1 Ll LR 182 ***(cons)***
The Acrux [1965] 2 All ER 323 ***(cit)***
The Emilie Millon [1905] 2 KB 817 ***(cit)***
The Spermina [1923] 17 Ll L Rep 17 ***(cit)***
The Ousel [1957] 1 Ll L Rep 151 ***(cit)***
The Freightline One [1986] 1 Ll LR 266 ***(foll)***
The Sierra Nevada [1932] 42 Ll L Rep 309 ***(cit)***

Legislation referred to:

Port of Singapore Authority Act (Cap 173) [Sing], ss. 53, 64, (1), (2), (3), 65
Port of Singapore Authority (Scale of Dues and Rates) Notification 1980 [Sing], s. 1 Item 1(d)(ii) First Schedule
Merchant Shipping Act 1894 [UK], s. 35

Other source referred to:

Thomas on Maritime Liens (14th Edn.)

For the plaintiffs - Loh Boon Huat (Augustine Liew with him)
For the interveners - Muthu Arusu (Lim Tean with him)

JUDGMENT

M Karthigesu J:

Two motions, the first filed on 27 March 1989 at the instance of the Port of Singapore Authority (PSA) as interveners, (the PSA motion) and the second filed on 28 June 1991 at the instance of the first plaintiff for the determination of priorities (the priorities motion) came on for hearing together, before me on 15 August 1991. The PSA motion is for the payment out of $196,560 (which is the finally amended figure and to which sum PSA's claim is now limited) from the proceeds of sale of the vessel *"Felicie"* and bunkers, to them as sheriff's charges and expenses in respect of port dues incurred by the *"Felicie"* during the time she was under arrest in these proceedings. The priorities motion is for the determination of priorities as follows: - firstly, the sheriff's expenses incurred in the arrest and sale of the *"Felicie"* which the plaintiffs had already paid totalling $178,985.80 together with the costs of and incidental to the motion; secondly, the first plaintiff's claims against the defendants for which a judgment had been entered in these proceedings, namely (i) damages at $100,213;

(ii) interest up to date of judgment at $28,633 and on the judgment at 8% per annum, and; (iii) taxed costs including taxing and allocatur fees at $295,738.10, and; thirdly, PSA's claim for port dues, garbage dues and pilotage dues at $263,062 (which is now limited to $196,560).

The *"Felicie"* was sold for $170,000 on 5 August 1982 pursuant to an order of Court dated 12 March 1982 made in these proceedings. This was after the plaintiffs had entered judgment against the defendants. The bunkers on board her were sold for $44,717.40 making a total of $214,717.40 which sum is in Court and represents the proceeds of sale of the *"Felicie"*. It is but right to note that a previous application to Court for the sale of *"Felicie"* made on 29 April 1978 was unsuccessful.

The question to be addressed in both these motions is the same. It is whether PSA's claim for port dues, the claim is now confined to port dues alone, of a vessel arrested in admiralty proceedings forms part of the sheriff's expenses and is it paid out of the proceeds of sale of the arrested vessel in priority to all other claims as such, and if so, does it rank *pari passu* with the other items forming the sheriff's expenses or does it rank paramount to all the other items forming the sheriff's expenses. This is how Mr Muthu Arusu, Counsel for PSA, framed the question for the Court. The question may be framed in another way and that is whether a port authority's dues of a vessel arrested in Admiralty proceedings, apart from specific legislation giving the port authority specific rights, is a debt due from the owner of that vessel to the port authority which can be claimed only after a judgment has been entered, if one can be entered pursuant to the admiralty jurisdiction of the Court. Further if the port authority is given specific rights for the recovery of port dues by specific legislation must that right be expressly or at least impliedly asserted against the vessel in question before the claim can be enforced against that vessel and claimed in priority to all other claims against that vessel. This is how Mr Loh Boon Huat, Counsel for the first plaintiff, would frame the question for the Court.

The *"Felicie"* was arrested in these proceedings by the Admiralty Marshall at the instance of the plaintiffs on 30 September 1976. On that date and before the arrest was effected, the plaintiffs, through their solicitors, gave the usual undertaking in the standard form. The undertaking read as follows:

> Particulars of property to be arrested: the vessel *"Felicie"*.
>
> It is requested that the warrant lodged herewith be executed by the arrest of the vessel *"Felicie"*.
>
> An undertaking is hereby given that the sheriff shall be indemnified and be provided with sufficient funds as and when required by the sheriff to meet the charges and expenses that may be incurred in consequence of these instructions.
>
> Dated 30 September 1976.
>
> (signed)
> Solicitors for the plaintiffs.

Pursuant to this undertaking the plaintiffs placed the sheriff in funds as and when he requested for them and in this way the charges and expenses the sheriff incurred in arresting and maintaining the arrest of the *"Felicie"* until she was sold on 5 August 1982 were met. These are the charges and expenses I have referred to earlier totalling $178,985.80. It is not disputed that the first plaintiff is entitled to the same priority the sheriff would be entitled to. However these charges and expenses do not include the port dues. The reason why they did not will now be addressed.

Following the arrest of the *"Felicie"* on 30 September 1976, the plaintiffs' then solicitors addressed the PSA inquiring as to whom the PSA would look to for the settlement of port dues and other charges during the period of the vessel's arrest. PSA replied on 26 May 1977, *inter alia*, as follows:

> Your clients being the arresting party must ensure that these charges are paid. As a matter of procedure we have to look to the sheriff for payment who will in turn look to your clients for payment.

The plaintiffs' then solicitors next addressed the sheriff on 30 May 1977 again, *inter alia* as follows:

> Messrs Drew & Napier (solicitors for the defendants) have advised us that the sheriff, in practice, is obliged to pay the port dues and other dues of the Port of Singapore Authority only when any vessel under arrest is sold by the sheriff. It appears that the Port of Singapore Authority are of a different opinion.

The sheriff replied on 2 June 1977 in these terms:

> Messrs Drew & Napier are correct in advising you that, in practice, the sheriff is only obliged to meet port and other dues of the Port of Singapore Authority after the sale of an arrested vessel. The liability for payment of port dues and other dues of the Authority is to be found in the Port of Singapore Authority Act, Cap 173 (Cap 236 of the 1985 revised edn. of the Laws of Singapore) and it is apparent that neither the sheriff nor the arresting party is ever liable for such dues.

This unfortunate conclusion of the sheriff's letter may have lulled the plaintiffs' solicitors into a false sense of security as it seems clear that the sheriff was referring to liability under the Act and not to the practice of treating port dues as part of the sheriff's expenses and effecting payment when the vessel is sold.

However that might be there has been a practice known to all admiralty practitioners in Singapore that PSA port dues payable in respect of vessels arrested in admiralty proceedings are paid out to the PSA as part of the sheriff's expenses either recovered from the arresting party or more commonly out of the proceeds of the sale after the vessel is sold by an order of Court. The question is whether this practice is well founded. It has not been called into question before.

The first plaintiff and its solicitors whether they accepted the practice or not were well aware of it. In support of the application for an order for the sale of the *"Felicie"* made on 29 April 1978 Hatim Fidahusein Tyebally, a director of the first plaintiff deposed as follows:

> 8. In any event, the proceeds of sale of the vessel would be reduced not only by the expenses of sale but also by the amount of port dues payable upon the vessels tonnage to the Port of Singapore Authority. I am informed by my solicitor that the defendants' solicitors have indicated that as at 22 April, 1978, a sum of $75,000 is already due and owing to the Port of Singapore Authority. Port dues will continue to be incurred for as long as the vessel remains within the port limits of Singapore at the rate of $32,760 per annum or part thereof if item 1(d)(iii) of the First Schedule, s.1, of the Port of Singapore Authority (Scale of Dues and Rates) Notification 1975 is applied.

Then again in the application to Court for an order for the sale of the *"Felicie"* made on 12 March 1982, another director on the first plaintiff, Abdul Kader Fida Husein Tyebally, in support thereof deposed as follows:

> 13. In any event, the proceeds would be reduced not only by the costs incurred in the arrest, keeping under arrest and sale of the said vessel but also by the amount of the port dues payable on the said vessel's tonnage to the Port of Singapore Authority.

> 14. ... Further, port dues which will continue to be incurred for as long as the vessel remains under arrest within the port limits of Singapore are accumulating at the rate of $32,760 per annum or part thereof pursuant to item 1(d)(ii) of s.1 of the First Schedule of the Port of Singapore Authority (Scale of Dues and Rates) Notification 1980. To date, a sum of $196,560 is due and owing to the Port of Singapore Authority ....

Not only do these two affidavits show that the first plaintiff and its solicitors were aware of the practice referred to, they also knew the exact sum due and owing to the Port of Singapore Authority.

After the sheriff's letter to the plaintiffs' solicitors dated 2 June 1977 to which I have referred above nothing seems to have happened until the sheriff wrote again to the plaintiffs' solicitors on 31 August 1982. By this letter the sheriff forwarded to the plaintiffs' solicitors PSA's bill for dues dated 16 August 1982 for $260,640 (port dues $196,560 and garbage dues $64,080) for direct payment to the PSA and also gave an account of his expenses incurred in the arrest of the *"Felicie"* totalling $439,625.80 which included the PSA dues of $260,640. The Sheriff also informed the Plaintiffs' solicitors of the amounts realised on the sale of the *"Felicie"* on the 5 August 1982 namely $170,000 and $44,717.40 for the vessel and her bunkers respectively.

In the meanwhile, however, the PSA on 29 July 1978 put the sheriff on notice that should the *"Felicie"* be released from arrest, the PSA would arrest her under s. 61 (now s. 64) of the PSA Act that is under the statutory power given to the PSA to recover port and other dues by arrest and sale of the vessel. This letter, it appears, was not communicated to the plaintiffs' solicitors.

The plaintiffs' solicitors did not reply to the sheriff's letter to them dated 31 August 1982 until 8 March 1983 when they objected in principle to the inclusion of PSA's dues as part of the sheriffs' expenses. The sheriff by letter dated 30 March 1983 explained at length the existence of the practice of including port dues as part of the sheriff's expenses and traced it to its origins emanating from the *dicta* of Brandon, J. in *The Queen of the South* [1968] 1 Ll.L.R. 182. He concluded his letter as follows:

> The point is not new or novel one. The Courts here have always ruled such expenses as sheriff's expenses. I would therefore be grateful if you would reconsider your stand and save us the trouble of having to enforce your undertaking, which you know we must.

The plaintiffs' solicitors were not persuaded. An *impasse* was reached. Neither party would move in the matter. The PSA attempted to break the *impasse* firstly by obtaining leave to intervene in these proceedings and secondly by commencing proceedings themselves to recover their dues by an admiralty action *in rem* against the proceeds of sale of the *"Felicie"*. The action was not proceeded with. These acts of the PSA in my view were equivocal. I do not think the PSA can invoke the admiralty jurisdiction of the Court to enforce a claim for port dues. See *The Acrux* [1965] 2 All ER 323. Neither was there any right to intervene in these proceedings. In my view the proper course for the PSA to have taken was to have persuaded the sheriff to apply to Court in his name, by agreeing to indemnify the sheriff of all costs and expenses, to have the question as to whether port dues can be recovered from the proceeds of sale as part of the sheriff's expenses and in priority to all other items of the sheriff's expenses, resolved. They have not done this but instead have come to Court in their own name. I shall have something to say about this later on.

Section 53 of the PSA Act provides that the owner, agent or master of every vessel which enters, leaves, uses or plies within the port of calls at Singapore shall pay to the Authority such port or other dues as the Authority may, with the approval of the Minister and by notification in the Gazette, from time to time prescribe. Thus there is a statutory obligation to pay port and other dues.

The PSA Act provides two means of recovery. Primarily a power to distrain for non-payment of dues is given by s. 64. The power to arrest and detain is given by subsection (1). The power to sell is given by subsection (2) but no sale shall be effected unless the dues remain unpaid for a period of 14 days after the arrest. The sub-section also provides how the proceeds of sale shall be dealt with. Subsection (3) enables the PSA to detain a vessel (without arrest) until all dues are paid by giving notice to the Port Master who then shall not grant the vessel port clearance until the amount so chargeable has been paid or security given to the satisfaction of the PSA.

Additional to but not in substitution of the powers given to the PSA by s. 64 of the Act the dues or in the case of sale, the balance thereof when the proceeds of sale are insufficient, recovery can be by civil proceedings. This is provided by s. 65 of the PSA Act.

It is manifestly clear that there is no requirement for the PSA to first obtain a judgment in civil proceedings before enforcing a claim for port dues. It is also manifestly clear that the person to be sued for the dues is the owner of the vessel, notwithstanding that by s. 53 the agent and the master and by s. 64 the master are also made liable. References to agent and master in s. 53 and s. 64(1) simply indicate the vicarious liability of the owner through the acts of his agents or servants. This is trite, notwithstanding the arguments addressed by Counsel for the plaintiffs.

The legal position as to statutory rights of detention and sale is comprehensively stated in *Thomas on Maritime Liens* (14th Edn.) para. 414 as follows:

> By a public or private Act of Parliament an undertaking such as a port, dock or harbour authority may expressly be given a power to detain and sell a ship and possibly her cargo. Such a power is customarily created so as to provide a security for unpaid dues and charges, or for damage done by a vessel or necessary services rendered to a vessel and her cargo. It is now well established that such a statutory right of detention and sale stands in priority to all other claims against the vessel for, in creating the power, this is presumed to have been the intention of the legislature. Such is the distinctiveness and superiority of these statutory rights that they cannot properly be considered as falling within the province of priorities. Questions of priority only fall to be considered after the statutory claim has been satisfied.
>
> The superiority of the statutory right means that a dock or similar body may, if it chooses, exercise its statutory rights notwithstanding that the vessel is under the arrest of the Admiralty Marshal, although it has no power to interfere directly with the Marshal's custody; or alternatively, it may apply to the Court to seek release of the vessel from arrest. In the words of Collins MR nobody can against the will of the board, undo or annul the statutory provision.
>
> Despite the clear recognition of the primacy of the statutory rights the Court may nonetheless in the interest of other claims which may be involved, make the dock or other authority accountable to the Court in the exercise of its statutory powers or, when possible, direct that the available securities be marshalled.

The rationale underlying the passage quoted from *Thomas on Maritime Liens* is to be found in recent English case authority. In *The Queen of the South* [1968] 1 Ll.L.R. 182 this question seems to have arisen for the first time before an English Court. Brandon J (as he then was) addresses it at p. 191 as follows:

a The right of a dock or harbour authority under its private Acts to detain a ship for rates is a statutory possessory lien. *Mersey Docks and Harbour Board v. Hay & Ors (The Countess)*, [1923] AC 345; [1923] 14 Ll L Rep 441, per Earl of Birkenhead at pp. 354 and 444 of the respective reports. The right of such an authority to sell a ship in order to reimburse itself for rates out of the proceeds, may be compared with the mortgagee's right of sale usually given to him by contract and in any case by s. 35 of the Merchant Shipping Act 1894.

b It is well established that, in an action in *rem* against a ship, the Court has power to sell her free of both a repairer's common-law possessory lien and a mortgagee's contractual or statutory right of sale. It does so on the basis that the rights of which the ship is freed by the sale, together with any priority over other rights to which they may be entitled, are transferred to, and preserved against, the proceeds of sale in Court.

If the matter was free from authority, I should have thought in principle that the Court
c should be able to deal with the statutory possessory lien of a dock or harbour authority in the same way as it deals with the common-law possessory lien of a repairer; and with the statutory right of sale of such an authority in the same way as it deals with the contractual or statutory right of sale of a mortgagee. That is to say, I should have thought that the Court should have power, in an action in *rem* against a ship, to sell free of both rights, while transferring equivalent rights with equivalent priority to the proceeds of sale in Court, and further should have power to do this whether the dock or harbour authority consents or not.

d If the Court does not have such power it is extremely inconvenient. For it means that, in any case where a dock or harbour authority has a right of detention or sale, the Court cannot transfer the ship to a purchaser free from encumbrances, with all the disadvantages arising from such a situation discussed by Mr Justice Hewson in *The Acrux.*

It appears from the decision of the Court of Session in Scotland in *The Sierra Nevada*
e [1932] 42 Ll L Rep 309, that by the law of Scotland, the Court does have such power, certainly where the dock or harbour authority consents, and perhaps also where it does not. The actual decision only covers the case where the authority consents, but there are passages in Lord Fleming's judgment which seem to indicate that, if necessary, he might have been prepared to go further and hold that the Court could exercise the power even without such consent. In particular, the manner in which he equates common-law and statutory possessory liens in his discussion of the principles involved at pp. 310 to 311 of his judgment seems to
f me to point in that direction.

While that is the view of the law which I should have taken if the matter were free from authority, it is clear that it is not supported by the English decisions, to which I must now refer.

I defer to this learned disposition by Lord Brandon, as he now is, and since this Court is
g not bound by English decisions I need not refer further to his judgment where he discusses the earlier English cases of *The Emilie Millon* [1905] 2 KB 817, *The Sea Spray* [1907] P. 133, *The Spermina* [1923] 17 Ll L Rep 17, and 109 and *The Ousel* [1957] 1 Ll L Rep 151 and the concessions he had to make to his earlier expressed view in the light of these decisions.

The question was taken one step further by Sheen J in *The Freightline One* [1986] 1 Ll.L.R. 266 where he expressly recognises the current English practice. At p. 268 of the report he
h says:

Port charges arising after the ship is arrested are always paid by the Admiralty Marshal and become part of his expenses of maintaining the arrest. As such they are a first charge on the proceeds of sale of the ship. When a warrant for the arrest of a ship has been issued the Admiralty Marshal obtains from the arresting solicitors a personal undertaking to pay within 14 days of demand all fees and expenses incurred by him in connection with the arrest of the
i ship or endeavours to arrest her, and the cost of maintaining her while under arrest. For the sake of completeness and for the benefit of practitioners I will add that the Admiralty Marshal

> requires a further personal undertaking from solicitors who have obtained an order for the appraisement and sale of a ship. The second undertaking is given when the commission for appraisement and sale is lodged, and is an undertaking to pay on demand the fees and expenses of the Marshal incurred by him, or on his behalf, in respect of the appraisement and sale of the property, or of endeavours to appraise or to sell the property. A solicitor who has had to pay to the Marshal such fees and expenses in compliance with either of his personal undertakings will make recovery of such payment out of the proceeds of the sale of the ship immediately after the Admiralty Marshal has made recovery of any other expenses which he has incurred.

These words of Sheen J. echo the practice that has been of long standing in these Courts that port dues form part of the sheriff's expenses and are recoverable as such, in priority to all other claims from the proceeds of sale of the vessel arrested in admiralty proceedings and I endorse them. This practice was expressly referred to in the sheriff's letter to the plaintiffs' solicitors dated 30 March 1983 and in his earlier letters although not so explicitly.

In the result the question as formulated for the Court by the plaintiffs' solicitors is without substance. I hold that the practice of the sheriff treating PSA's port dues and other dues (subject to them being accounted to the sheriff or to the Court where necessary) is well founded and that it has been an established practice since well before 1976.

I also hold that the plaintiffs and their solicitors (the same solicitor acted for them and continues to act notwithstanding the several changes of solicitors) were well aware of this practice. (See the extracts from the two affidavits I have set out). I further hold that the PSA acted in recognition of this practice (see their letters referred to and in particular their letter to the sheriff dated 29 July 1978 also referred to) although it must be said that their earlier action showed equivocalness.

The PSA are entitled to be paid the port dues in the sum of $196,560 as a paramount first priority payment out of the proceeds of sale of the *"Felicie"* and her bunkers now in Court and I so order. The balance sum after this payment remaining in Court shall be paid to the first plaintiff or to its solicitors towards the remainder of the sheriff's expenses and the first plaintiff's judgment in these proceedings in that order.

Earlier in this judgment I referred to the impropriety of PSA's motion. Although technically the application should have been made by the sheriff I see no reason to deny the PSA of what is due to them as a statutory right due to this procedural impropriety. However the PSA ought to be deprived of part of the costs of the hearing of the two motions. I therefore order that there shall be only one set of costs to be taxed in respect of the two motions and that the first plaintiff shall pay the PSA one half of such taxed costs.

Also found at [1991] 3 CLJ 3050